IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

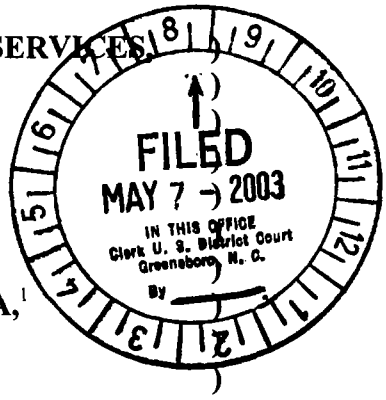
COMMUNITY RESIDENTIAL SERVICES, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,[1]

Defendant.



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MEMORANDUM OPINION AND ORDER

SHARP, Magistrate Judge

This matter comes before the Court on a motion by Plaintiff Community Residential Services, Inc. ("CRS") for summary judgment (Pleading No. 13) and a cross-motion by Defendant United States of America for summary judgment (Pleading No. 11). The motions have been fully briefed and are ready for a ruling.

I. Procedural History

On February 22, 2002, Plaintiff CRS filed a Complaint in this Court under 26 U.S.C. § 6330 of the Internal Revenue Code. Plaintiff sought judicial review of a January 25, 2002 Notice of Determination by the IRS that it had followed all procedural, administrative and legal requirements to obtain a levy to collect unpaid employment tax assessed against CRS for all four quarters of 1999.

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[1] In its Answer, Defendant indicated that the proper defendant in a suit of this nature is the "United States of America" rather than the "Internal Revenue Service," but Defendant filed no motion for substitution. The Court now amends the caption to show the proper formal defendant, but, for ease of understanding, when referring to the Defendant, the Court will use the acronym "IRS."

On June 6, 2002, IRS filed an Answer asserting an affirmative defense and requesting that the Complaint be dismissed. As this is an action for administrative review, the parties were not entitled to take discovery, and the Court's review is limited to the administrative record. *See Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

II. Statement of Facts

CRS operates residential services and a group home for mentally and physically challenged individuals in central North Carolina. (Pleading No. 12, Def.'s Br., Mary Green Decl., Exh. D, Appeals Case Memo. at 1.) On September 6, 1999, September 13, 1999, January 10, 2000 and June 5, 2000, the IRS assessed federal employment taxes against CRS for each of the four quarters of 1999. *Id.* at 3. Throughout 2000 and the first half of 2001, the IRS and CRS engaged in numerous communications regarding the delinquent taxes but did not manage to agree to a plan for repayment of the taxes. *Id.* at 3-4. On July 19, 2001, the IRS sent CRS a Notice of Intent to Levy to collect the unpaid employment taxes. (Green Decl. ¶ 3, Exh. A.) On August 15, 2001, CRS timely filed a request for a Collection Due Process Hearing under 26 U.S.C. § 6330. *Id.* ¶ 4, Exh. B. In its request for a hearing, CRS maintained that it was under "tight financial constraints" during the time of the tax delinquency, and that a levy of CRS' assets would cause a hardship for the company and likely trigger a bankruptcy liquidation. *Id.*

On October 3, 2001, Appeals Officer Mary Green was assigned to conduct the hearing. In accordance with section 6330(b)(3), Green had not had any prior involvement with the outstanding taxes owed by CRS. *Id.* ¶ 5; 26 U.S.C. § 6330(b)(3)(2003). By letter dated October 9, 2001, Green notified CRS of the hearing's purpose and procedures and scheduled the hearing for October 24, 2001. *Id.* ¶ 6, Exh. C. By request of CRS, the hearing was continued to November 21, 2001 and then continued again to December 17, 2001. Counsel for CRS indicated that the reason for each

continuance was to give CRS time to formulate an offer-in-compromise ("OIC") to submit at the hearing. *Id.* ¶ 7.

On December 17, 2001, Green held the Collection Due Process Hearing in Charlotte, North Carolina, which was attended by Patrick Newton, counsel for CRS. *Id.* ¶ 8. During the hearing, Newton did not dispute that CRS was liable for the unpaid employment taxes subject to the levy. *Id.* ¶ 9. Despite the two continuances, Newton was unprepared at the hearing to present an OIC or any other alternative to levy. *Id.* ¶ 10. Green reviewed CRS' financial statements with Newton and inquired as to why CRS had purchased additional vehicles and real property during periods of tax delinquency. *Id.*, Exh. D. When Newton was unable to provide a satisfactory explanation, Green informed Newton that she would disregard any expenses incurred by CRS during and after tax delinquencies that had not been shown to be "necessary." Green advised Newton that, in light of her amendments, CRS' financial statements reflected that its income exceeded its expenses by $95,476 per year. As such, Green advised that CRS could "full pay" its taxes within two years and would not qualify for an OIC. Green informed Newton that if CRS intended to pursue an OIC, Newton must address the issue of allowable expenses. Green gave Newton one additional week to submit an OIC and supporting documentation. *Id.* ¶ 10. CRS did not submit an OIC or any other alternative to levy within the one-week deadline. *Id.* ¶ 11.

On January 25, 2002, Green issued a Notice of Determination that the IRS had followed the procedural, administrative and legal requirements incident to issuing a Notice of Intent to Levy, and that the intrusiveness of the Notice of Intent to Levy was commensurate with the need to collect revenue. *Id.*, Exhs. E, F. The Notice of Determination contained the following rationale:

> Section 6330(c)(3)(c) requires that the Settlement Officer determine that the Notice of... Intent to Levy balances the need for efficient tax collection with the legitimate concern of the taxpayer that any collection action be no more intrusive than

> necessary; in other words, only the least intrusive method that still protects the Government's interest in efficient tax collection should be approved. You proposed an offer-in-compromise as a collection alternative, but you did not submit one when given numerous opportunities and extensions of time to do so. The legitimacy of any concern that collection action be no more intrusive than necessary is diminished when an offer is not submitted when extensions of time are given. Therefore, the Notice of Intent to Levy is not improper and is commensurate with the need to collect revenue in this case.

Id., Exh. E. Eight months later, on September 16, 2002, CRS submitted an OIC to the IRS in which CRS proposed to pay a total of $104,000.00 in monthly installments of $4,333.33 for two years. (Pleading No. 14, Pl.'s Br., Exh. D.)[2]

III. Summary Judgment Standard of Review

The summary judgment standard of review under Rule 56 is well established. A party is entitled to judgment as a matter of law upon a showing that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists if the nonmoving party fails to make a sufficient showing on an essential element of its case as to which it would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In evaluating a forecast of evidence on summary judgment review, the court must view the

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[2] The Court notes that Exhibits A through D attached to Plaintiff CRS' Memorandum Supporting Motion for Summary Judgment are not properly before the Court. Rule 56 of the Federal Rules of Civil Procedure requires that motions for summary judgment be supported by pleadings, depositions, answers to interrogatories, admissions, and affidavits. Documents such as CRS' Exhibits A through D that are not attached to depositions or affidavits and identified by the deponent or affiant have not been authenticated and lack a proper foundation. *See also* LR56.1 (requiring parties moving for summary judgment to "point to specific, *authenticated* facts existing in the record or set forth in accompanying affidavits that show a genuine issue of material fact.")(emphasis added).

facts and inferences reasonably to be drawn from them in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

When the moving party has carried its burden, the nonmoving party must come forward with evidence showing more than some "metaphysical doubt" that genuine and material factual issues exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), *cert. denied,* 481 U.S. 1029 (1987). A mere scintilla of evidence is insufficient to circumvent summary judgment. *Anderson*, 477 U.S. at 252. Instead, the nonmoving party must convince the court that, upon the record taken as a whole, a rational trier of fact could find for the nonmoving party. *Id.* at 248-49. Trial is unnecessary if "the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993).

IV. Discussion

The United States moves for summary judgment on the ground that the IRS met all of the procedural, administrative and legal requirements incident to the issuance of a Notice of Intent to Levy. In addition, the IRS maintains that the proper standard of judicial review in this case is abuse of discretion, citing *Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559-60 (M.D.N.C. 2001)(Tilley, J.). The IRS argues that due to CRS' failure to offer any alternatives to levy, the IRS did not abuse its discretion in finding that the Notice of Intent to Levy was proper and commensurate with the need to collect revenue.

CRS opposes the United States' motion for summary judgment and advances its own summary judgment motion on the ground that the IRS should not have determined that the intrusiveness of a levy was commensurate with the need to collect taxes, because the IRS refused to consider any other alternatives to levy. CRS maintains that the IRS should consider its OIC filed

on September 16, 2002 before proceeding with levy. CRS further maintains that the IRS should have taken into consideration the charitable nature of its business and the serious harm that a levy would cause to its business and its consumers, the physically and mentally disabled. Finally, CRS disputes that the proper standard of review in this case is abuse of discretion.[3]

At the outset, the Court finds the reasoning in *Dogwood Forest* to be persuasive and will apply an abuse of discretion standard of review to the IRS' determination in this case. Where the validity of the underlying tax liability is properly at issue, the Court will review the matter on a *de novo* basis. However, where, as here, the taxpayer is not challenging the underlying tax liability but rather the means proposed to collect the tax, i.e., levy, the Court will review the IRS' determination for abuse of discretion. *Dogwood Forest*, 181 F. Supp. 2d at 559-60; *see also Carroll v. United States*, 217 F. Supp. 2d 852 (W.D. Tenn. 2002); *Nichols v. Comm'r*, No. 9793-OIL, 2002 WL 31890040 (U.S. Tax Ct. Dec. 30, 2002)(unpublished opinion); *Sego v. Comm'r*, No. 12313-99L, 2000 WL 889754 (U.S. Tax Ct. June 30, 2000)(unpublished opinion).

Section 6330 of the Internal Revenue Code, which provides for a pre-levy hearing and judicial review, was added to the Internal Revenue Code by the IRS Restructuring and Reform Act of 1998. 112 Stat. 685, 747-49. Pursuant to section 6330(a), no levy may be made unless the IRS notifies the taxpayer at least 30 days before the date of the levy of (1) the IRS' intent to levy; and (2) the taxpayer's right to a Collection Due Process Hearing before an Appeals Officer. 26 U.S.C. § 6330(a)(2003). Section 6330(b) requires that the hearing be conducted by an Appeals Officer who has had no prior involvement with the unpaid taxes subject to the levy. 26 U.S.C. § 6330(b)(2003). Section 6330(c) requires the Appeals Officer to (1) obtain a verification from the Secretary of the

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[3] However, CRS does not suggest to the Court what the proper standard of review should be nor cite to any supporting authority.

IRS that the requirements of any law or administrative procedure have been met; (2) consider any issues raised by the taxpayer at the hearing; and (3) consider whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary. 26 U.S.C. § 6330(c)(2003).

Upon review of the administrative record, the Court finds that the IRS has met all of the administrative, procedural and legal requirements for issuance of a Notice of Intent to Levy in this case. The undisputed facts show that the IRS sent CRS a "Notice of Intent to Levy and Notice of Your Right to a Hearing" on July 19, 2001. (Green Decl. ¶ 3, Exh. A.) After CRS requested a Collection Due Process Hearing, an impartial Appeals Officer with no prior involvement with CRS' unpaid tax was assigned to conduct the hearing. *Id.* ¶ 5. The Appeals Officer continued the hearing on two occasions to give CRS the opportunity to submit an OIC or other alternative to levy. *Id.* ¶ 7. Furthermore, although a hearing by telephone is sufficient, CRS was provided with a face-to-face hearing on December 17, 2001. *Id.* ¶ 8, Exh. C.

In regard to the requirements of section 6330(c), the undisputed facts show that the Appeals Officer verified that all applicable laws and administrative procedures incident to the issuance of a Notice of Intent to Levy had been met. *Id.*, Exh. D, Appeals Case Memorandum at 4-5. Moreover, despite counsel for CRS' inability to present an OIC or other alternative to levy, the Appeals Officer considered the issues counsel for CRS raised at the hearing and granted CRS a further one-week extension to submit an OIC or other alternative to levy. *Id.* ¶ 10, Exh. D, Appeals Case Memorandum at 2, 5. CRS failed to submit any alternatives to levy within the one-week deadline.

Id. ¶ 11.[4] Finally, the Appeals Officer did balance the IRS' need for efficient tax collection with the concern of CRS that any collection action be no more intrusive than necessary. The Appeals Officer determined that CRS' failure to present any alternatives to levy, despite numerous opportunities to do so, greatly diminished the legitimacy of any concern that the proposed levy was more intrusive than necessary. Accordingly, the Appeals Officer concluded that levy was not improper and commensurate with the IRS' need to collect the unpaid employment taxes from CRS. On this record, the Court finds no abuse of discretion in the rationale and ultimate determination of the Appeals Officer.

V. Conclusion

For the reasons stated above, **IT IS HEREBY ORDERED** that Plaintiff CRS' motion for summary judgment (Pleading No. 13) be **DENIED**, that the motion for summary judgment by the United States of America (Pleading No. 11) be **GRANTED**, and that this action be dismissed with prejudice.

P. Trevor Sharp, U.S. Magistrate Judge

May 7, 2003

[4] CRS' argument that the IRS should have considered its OIC submitted on September 16, 2002 is without merit. The IRS' Notice of Intent to Levy was mailed to CRS on July 19, 2001 and the IRS gave CRS until December 24, 2001 to submit any proposed alternatives to levy. This is a period of over five months. The IRS was under no obligation to consider an OIC submitted nearly eights months after the IRS issued its Notice of Determination on January 25, 2002. Nor is this Court able to consider the September, 2002 OIC. As stated above, in actions for administrative review such as this case, the Court's consideration is limited to the administrative record, and the parties are not permitted to take discovery or supplement the record with additional evidence. In addition, as discussed above, Exhibit D attached to CRS' Memorandum Supporting Motion for Summary Judgment has not been properly authenticated.